

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE PCT NATIONAL STAGE APPLICATION OF
HOPKINSON ET AL.

Art Unit: 1616
Examiner: Brown, Courtney A

INTERNATIONAL APPLICATION NO:

Conf. No. 3539

PCT/US04/39929

IA Filing Date: November 30, 2004

U.S. Appln No.: 10/580,063

§ 371 Date: January 9, 2007

For: Submicron Mesotrione Compositions

Mail Stop Appeal Brief - Patents
Commissioner of Patents
P.O. Box 1450
Alexandria, VA 22313-1450

TRANSMITTAL OF APPEAL BRIEF

Appellants submit herewith an Appeal Brief in furtherance of the Notice of Appeal, filed in this case on June 17, 2009. This Brief is timely if filed by January 19, 2010 with a five (5) month extension.

Appellants enclose herewith the fee required under 37 C.F.R. 41.20(b)(2), the required petition for extension of time for filing this brief and fees therefore. Accordingly, Appellants enclose a credit card authorization for all requisite fees. Appellants authorize the Commissioner to charge any additional fees that are due or credit any overpayments to Deposit Account No. 50-1676 in the name of Syngenta Crop Protection, Inc.

Respectfully submitted,

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I. REAL PARTY IN INTEREST

The real party in interest in this appeal is Syngenta Crop Protection, Inc.

II. RELATED CASES

With respect to other prior or pending appeals, interferences or judicial proceedings that will directly affect, or be directly affected by, or have a bearing on the Board's decision in this appeal, there are no such appeals, interferences or judicial proceedings.

III. STATUS OF CLAIMS

The status of the claims in this application is:

Claims 1 – 32 were originally presented.

Claims 12 – 14 and 30 – 32 stand withdrawn from consideration.

The claims on appeal are 1 – 11 and 15 - 29.

IV. STATUS OF AMENDMENTS

The amendment dated June 17, 2009 filed subsequent to the March 17, 2009 final rejection has been entered.

IV. SUMMARY OF CLAIMED SUBJECT MATTER

By way of summary, the problem addressed by the present invention is the provision of a suspension concentrate or suspoemulsion formulation comprising submicron mesotrione which exhibits improved physical storage stability, handling and particular dilution characteristics. This problem is solved by the present invention by providing such a formulation wherein the mesotrione therein has an average particle size of less than 1 micron.

The claimed subject matter on appeal is:

<u>Claim</u>	<u>Specification Support, for example</u>
1. A suspension concentrate comprising a herbicidally effective amount of mesotrione, as well as agrochemically acceptable salts thereof, having an average particle size of less than 1 micron and a dispersing agent.	Page 2, lines 8 – 12.
2. The suspension concentrate according to claim 1 wherein the mesotrione, or agriculturally acceptable salt thereof, has an average particle size of less than 800 nanometers.	Page 2, lines 8 – 12.
3. The suspension concentrate according to claim 1 wherein the mesotrione comprises a metal chelate of mesotrione	Page 4, lines 24 – 27
4. The suspension concentrate according to claim 3 wherein the metal chelate of mesotrione comprises at least one member selected from the group consisting of copper or zinc chelates of mesotrione.	Page 4, lines 24 – 27
5. The suspension concentrate according to claim 1 further comprising at least one additional solid, water-insoluble active ingredient	Page 7, lines 20 – 25

Claim	Specification Support, for example
6. The suspension concentrate according to claim 1 wherein the at least one additional solid, water-insoluble active ingredient comprises at least one member selected from the group consisting of triazine herbicides, isoxazole herbicides[s] and sulfonylurea herbicides.	Page 7, lines 20 – 25
7. The suspension concentrate according to claim 6 wherein the at least one additional solid, water-insoluble active ingredient comprises a triazine herbicide.	Page 7, lines 20 – 25
8. The suspension concentrate according to claim 1 further comprising a water-soluble active ingredient dissolved in the aqueous phase.	Page 7, lines 26 – 27
9. The suspension concentrate according to claim 8 wherein the water-soluble active ingredient comprises at least one member selected from the group consisting of glyphosate, glufosinate and agriculturally acceptable salts thereof.	Page 8, lines 12 – 14
10. A pesticidal composition obtained by diluting a suspension concentrate according to claim 1 in water.	Page 16, lines 16 – 20
11. The pesticidal composition of claim 10 further comprising at least one member selected from the group consisting of co-herbicides, fungicides, insecticides, acaricides and nematocides.	Page 17, lines 28 – 31

Claim	Specification Support, for example
<p>15. A suspoemulsion formulation comprising</p> <p>(A) a continuous aqueous phase;</p> <p>(B) (i) a dispersed emulsion phase comprising at least one liquid, water-insoluble active ingredient;</p> <p>(ii) an emulsifier in an amount sufficient to emulsify the liquid, water-insoluble active ingredient; and</p> <p>(C) (i) a herbicidally effective amount of mesotrione having a particle size of less than 1 micron as a dispersed solid phase;</p> <p>(ii) a dispersing agent in an amount sufficient to disperse the mesotrione as well as any other solid technical materials present in the formulation;</p> <p>wherein the solid phase is dispersed in said aqueous and/or emulsion phase</p>	<p>Page 5, lines 14 – 26</p>
<p>16. The suspoemulsion formulation according to claim 15 wherein the mesotrione, or agriculturally acceptable salt thereof, has an average particle size of less than 800 nanometers.</p>	<p>Page 5, line 22</p>
<p>17. The suspoemulsion formulation according to claim 15 wherein the mesotrione comprises a metal chelate of mesotrione.</p>	<p>Page 4, lines 24 - 26</p>
<p>18. The suspoemulsion formulation according to claim 17 wherein the metal chelate of mesotrione comprises at least one member selected from the group consisting of copper or zinc chelates of mesotrione</p>	<p>Page 4, lines 24 - 26</p>

Claim	Specification Support, for example
19. The suspoemulsion formulation according to claim 15 wherein the liquid, water-insoluble active ingredient comprises at least one member selected from the group consisting of acetamide herbicides and safeners.	Page 6, lines 8 – 9
20. The suspoemulsion formulation according to claim 19 wherein the liquid, water-insoluble active ingredient comprises acetamide herbicides.	Page 6, lines 8 – 9
21. The suspoemulsion formulation according to claim 20 wherein the acetamide comprises mixtures of metolachlor (S) and (R) isomers wherein the ratio of (S)-2-chloro- <i>N</i> -(2-ethyl-6-methylphenyl)- <i>N</i> -(2-methoxy-1-methylethyl)acetamide to (R)-2-chloro- <i>N</i> -(2-ethyl-6-methylphenyl)- <i>N</i> -(2-methoxy-1-methylethyl)acetamide is in the range of from 50-100% to 50-0%.	Page 7, lines 1 – 6
22. The suspoemulsion formulation according to claim 15 further comprising at least one safener.	Page 6, lines 4 – 6
23. The suspoemulsion formulation according to claim 22 wherein the safener comprises at least one member selected from the group consisting of benoxacor and dichlormid.	Page 7, line 12
24. The suspoemulsion formulation according to claim 15 further comprising at least one additional solid, water-insoluble active ingredient.	Page 7, lines 20 - 22

Claim	Specification Support, for example
25. The suspoemulsion formulation according to claim 24 wherein the at least one additional solid, water-insoluble active ingredient comprises at least one member selected from the group consisting of triazine herbicides, isoxazole herbicides and sulfonylurea herbicides.	Page 7, lines 22 - 25
26. The suspoemulsion formulation according to claim 15 further comprising a water-soluble active ingredient dissolved in the aqueous phase.	Page 7, lines 26 - 27
27. The suspoemulsion formulation according to claim 26 wherein the water-soluble active ingredient comprises at least one member selected from the group consisting of glyphosate, glufosinate and agriculturally acceptable salts thereof.	Page 8, lines 12 – 14
28. A pesticidal composition obtained by diluting a suspoemulsion formulation according to claim 15 in water.	Page 16, lines 16 – 20
29. The pesticidal composition of claim 28 further comprising at least one member selected from the group consisting of co-herbicides, fungicides, insecticides, acaricides and nematocides.	Page 17, lines 28 - 31

V. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

- I. Whether claims 1, 2, 8 – 11, 15, 16 and 19 – 29 are unpatentable under 35 U.S.C § 103(a) 103 as being obvious over Hacker et al. (US 2003/0186816 A1) in view of Koltzenburg et al. (US 2007/0122436 A1).
- II. Whether claims 1 – 11, 15 and 19 – 29 are unpatentable under 35 U.S.C § 103(a) 103 as being obvious over Hacker et al. (US 2003/0186816 A1) in view of Nabors et al. (US 2005/0233907 A1).
- III. Whether claims 1, 6 – 11, 15, 17 and 18 are unpatentable under 35 U.S.C § 103(a) 103 as being obvious over Hacker et al. (US 2003/0186816 A1) in view of Cornes (US 6,924,250).

VII. ARGUMENTS

I. Whether claims 1, 2, 8 – 11, 15, 16 and 19 – 29 are unpatentable under 35 U.S.C § 103(a) 103 as being obvious over Hacker et al. (US 2003/0186816 A1) in view of Koltzenburg et al. (US 2007/0122436 A1).

35 USC §103(a) states:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

By way of summary, the instant application is a § 371 of international application PCT/US04/39929 filed November 30, 2004 which claims priority to US provisional application 60/527,364 filed December 5, 2003. Appellants reiterate that the problem to be solved by the presently claimed invention is the provision of mesotrione suspension concentrate (claim 1) or suspoemulsion (claim 15) formulations that exhibit improved physical storage stability, handling and, in particular, dilution characteristics. This problem is solved by the presently claimed invention by providing such formulations wherein the mesotrione therein has a particle size, in particular an average particle size, of less than 1 micron (sometimes hereinafter “submicron mesotrione”).

Hacker et al. (Hacker) relates to 3-way (component A, B and C) herbicide combinations comprising specific sulfonylurea herbicides. It is mentioned that component C may be one of 57 compounds, of which mesotrione just happens to be one (compound C8). Hacker further discloses that the herbicidal composition may (amongst others) be provided as a suspension concentrate (SC) or a suspoemulsion (SE). However, there is no specific teaching in Hacker of an SC or SE comprising mesotrione as required in claims 1 and 15. Nor is there any teaching or suggestion whatsoever in Hacker relating to improved mesotrione SE or SC formulations comprising submicron mesotrione as required in claims 1 and 15.

In the Final Office Action (page 5) the Examiner recognizes the deficiencies of Hacker and cites the Koltzenburg et al. (Koltzenburg) publication. However, Koltzenburg is not a reference against the instant application. Koltzenburg is a US application publication of international application PCT/EP2004/011797 which was filed on October 19, 2004, but was not published in English under PCT Article 21(2). Accordingly, Koltzenburg is only available as a reference as of its

May 31, 2007 publication date which is subsequent to the effective filing date of the instant application.

Appellants respectfully submit that claims 2, 8 – 11, 16 and 19 – 29 do not stand or fall together with independent claims 1 and 15.

More specifically, Hacker does not teach or suggest:

- claim 2 – a submicron mesotrione SC having an average particle size of 800 nanometers;
- claims 8 – 9 - a submicron mesotrione SC further comprising a water-soluble active ingredient such as glyphosate or glufosinate,
- claims 10 – 11 - a pesticidal composition prepared by diluting a submicron mesotrione SC in water,
- claim 16 - a submicron mesotrione SE having an average particle size of 800 nanometers;
- claims 19 – 23 - a submicron mesotrione SE further comprising at least one liquid, water insoluble active ingredient selected from acetamide herbicides and safeners including S-metolachlor and benoxacor
- claims 24 – 25- a submicron mesotrione SE further comprising at least one solid, water insoluble active ingredient such as a triazine herbicide,
- claims 26 – 27- a submicron mesotrione SE further comprising a water soluble active ingredient in the aqueous phase such as glyphosate or glufosinate, and
- claims 28 – 29 - a pesticidal composition prepared by diluting a submicron mesotrione SE in water.

In the absence of the teaching of the presently claimed invention, Appellants respectfully submit that one of ordinary skill in the art would not consider the present claims to be *prima facie* obvious over Hacker. It is only with the benefit of hindsight of the present invention that the Examiner infers one of ordinary skill would consider selecting mesotrione as component C and prepare the three-way compositions as SC or SE formulations. However, even if such selections are made, the resulting herbicide formulations would still not relate to submicron mesotrione formulations as required by the present claims. Accordingly, the claimed subject matter is considered to be non-obvious over Hacker.

II. Whether claims 1 – 11, 15 and 19 – 29 are unpatentable under 35 U.S.C § 103(a) 103 as being obvious over Hacker et al. (US 2003/0186816 A1) in view of Nabors et al. (US 2005/0233907 A1).

The deficiencies of Hacker are discussed above.

Recognizing the deficiencies of Hacker, the Examiner cites Nabors et al. (Nabors) for the proposition that Nabors would suggest the combination of mesotrione with acetamides herbicides. However, Hacker alone or in combination with Nabors still contains no teaching or suggestion relating to submicron mesotrione SCs (claim 1) or SEs (claim 15); nor that submicron mesotrione is useful to improve SC and SE formulations of mesotrione.

Appellants also respectfully submit that claims 2 – 11 and 19 – 29 do not stand or fall together with independent claims 1 and 15.

More specifically, Hacker alone or in combination with Nabors does not teach or suggest:

- claim 2 - a submicron mesotrione SC having an average particle size of 800 nanometers;
- claims 3 – 4 - a submicron mesotrione SC comprising a metal chelate of mesotrione such as a copper or zinc chelate,
- claims 5 – 7 - a submicron mesotrione SC further comprising at least one additional solid, water-insoluble active ingredient such as a triazine herbicide,
- claims 8 – 9 - a submicron mesotrione SC further comprising a water-soluble active ingredient such as glyphosate or glufosinate,
- claims 10 – 11 - a pesticidal composition prepared by diluting a submicron mesotrione SC in water,
- claims 19 – 23 - a submicron mesotrione SE further comprising at least one liquid, water insoluble active ingredient selected from acetamide herbicides and safeners including S-metolachlor and benoxacor,
- claims 24 – 25- a submicron mesotrione SE further comprising at least one solid, water insoluble active ingredient such as a triazine herbicide,
- claims 26 – 27- a submicron mesotrione SE further comprising a water soluble active ingredient in the aqueous phase such as glyphosate or glufosinate, and
- claims 28 – 29 - a pesticidal composition prepared by diluting a submicron mesotrione SE in water.

As above, in the absence of the teaching of the presently claimed invention, Appellants submit that the artisan of ordinary skill would not consider the present claims to be *prima facie* obvious over Hacker in view of Nabors. It is only with the benefit of hindsight of the present invention that the Examiner infers one of ordinary skill would consider combining submicron mesotrione and acetamide herbicides in the manner specified by the present claims. Accordingly, the claimed subject matter is considered to be non-obvious over the combination of Hacker and Nabors.

III. Whether claims 1, 6 – 11, 15, 17 and 18 are unpatentable under 35 U.S.C § 103(a) 103 as being obvious over Hacker et al. (US 2003/0186816 A1) in view of Cornes (US 6,924,250).

The deficiencies of Hacker are discussed above.

Recognizing the deficiencies of Hacker, the Examiner cites Cornes for the proposition that Cornes would suggest utilization of mesotrione chelates in herbicide combinations. However, Hacker alone or in combination with Cornes still contains no teaching or suggestion relating to submicron mesotrione SCs (claim 1) or SEs (claim 15); nor that submicron mesotrione is useful to improve SC and SE formulations of mesotrione.

Appellants also respectfully submit that claims 6 – 11, 17 and 18 do not stand or fall together with independent claims 1 and 15.

More specifically, Hacker alone or in combination with Cornes does not teach or suggest:

- claims 6 – 7 - a submicron mesotrione SC further comprising at least one additional solid, water-insoluble active ingredient such as a triazine herbicide,
- claims 8 – 9 - a submicron mesotrione SC further comprising a water-soluble active ingredient such as glyphosate or glufosinate,
- claims 10 – 11 - a pesticidal composition prepared by diluting a submicron mesotrione SC in water, and
- claims 17 – 18 - a submicron mesotrione SE comprising a metal chelate of mesotrione such as a copper or zinc chelate.

Once again, as above, Appellants respectfully submit that, in the absence of the teaching of the presently claimed invention, the artisan of ordinary skill would not consider the present claims to

be *prima facie* obvious over Hacker in view of Cornes. It is only with the benefit of hindsight of the present invention that the Examiner infers one of ordinary skill would consider utilizing submicron mesotrione as a chelate in the manner specified by the present claims. Accordingly, the claimed subject matter is considered to be non-obvious over the combination of Hacker and Cornes.

With respect to each of the various rejections, the Examiner reasons that one would have been motivated to make the claimed combination in order to receive the expected benefit of increasing the solubility, re-dispersibility, and bioavailability of the mesotrione herbicide by formulating with submicron mesotrione. The Examiner does not appear to appreciate that upon dilution of certain SC or SE formulations, the suspended particles will settle with time under gravity to the bottom of a container. The rate of sedimentation depends on a number of factors such as particle size, particle concentration, viscosity of the suspending medium and the specific gravity difference between the particles and the suspending medium. Once settled, the sediments may become hard packed, making redispersion or resuspension extremely difficult.

Appellants respectfully submit that in reaching a conclusion of obviousness, the Patent and Trademark Office must consider the "invention as a whole," which includes evidence of the invention's unexpected results. See *In re Margolis*, 228 USPQ 940 (Fed. Cir. 1986). Specifically, with regard to mesotrione containing formulations, the experiments and data referred to in Table 2 of the description show the redispersion properties of sediment material and how these are improved when submicron mesotrione is used. In the sediment, the particle phase volume is very high and the redispersibility is not governed by particle size per se. As shown, for example, in table 1 of the specification, the composition of the present invention is easier to redisperse than a similar composition having larger particles. This result is both surprising and unexpected. Thus, Hacker, taken alone or in combination with Nabors or Cornes, not only fails to relate to the problem solved by the presently claimed composition, but the cited references do not suggest or predict the basis of the instant technical success.

In view of the above arguments, Appellants respectfully submit that the rejections under 35 U.S.C. § 103(a) has been overcome and hereby request that this application be passed to issue.

VIII. CLAIMS APPENDIX

1. (Original) A suspension concentrate comprising a herbicidally effective amount of mesotrione, as well as agrochemically acceptable salts thereof, having an average particle size of less than 1 micron and a dispersing agent.
2. (Original) The suspension concentrate according to claim 1 wherein the mesotrione, or agriculturally acceptable salt thereof, has an average particle size of less than 800 nanometers.
3. (Original) The suspension concentrate according to claim 1 wherein the mesotrione comprises a metal chelate of mesotrione.
4. (Original) The suspension concentrate according to claim 3 wherein the metal chelate of mesotrione comprises at least one member selected from the group consisting of copper or zinc chelates of mesotrione.
5. (Original) The suspension concentrate according to claim 1 further comprising at least one additional solid, water-insoluble active ingredient.
6. (Previously presented) The suspension concentrate according to claim 1 wherein the at least one additional solid, water-insoluble active ingredient comprises at least one member selected from the group consisting of triazine herbicides, isoxazole herbicides and sulfonylurea herbicides.
7. (Original) The suspension concentrate according to claim 6 wherein the at least one additional solid, water-insoluble active ingredient comprises a triazine herbicide.
8. (Original) The suspension concentrate according to claim 1 further comprising a water-soluble active ingredient dissolved in the aqueous phase.
9. (Original) The suspension concentrate according to claim 8 wherein the water-soluble active ingredient comprises at least one member selected from the group consisting of glyphosate, glufosinate and agriculturally acceptable salts thereof.

10. (Original) A pesticidal composition obtained by diluting a suspension concentrate according to claim 1 in water.

11. (Original) The pesticidal composition of claim 10 further comprising at least one member selected from the group consisting of co-herbicides, fungicides, insecticides, acaricides and nematocides.

12. (Withdrawn) A method for controlling undesired plant growth in crops of useful plants, said method comprising treating the useful plants, their seeds or seedlings or the crop area thereof with a pesticidal composition according to claim 10.

13. (Withdrawn) The method of claim 12 wherein the pesticidal composition is applied pre- or post-emergent.

14. (Withdrawn) The method of claim 12 wherein the crop of useful plants is maize.

15. (Original) A suspoemulsion formulation comprising

(A) a continuous aqueous phase;

(B) (i) a dispersed emulsion phase comprising at least one liquid, water-insoluble active ingredient;

(ii) an emulsifier in an amount sufficient to emulsify the liquid, water-insoluble active ingredient; and

(C) (i) a herbicidally effective amount of mesotrione having a particle size of less than 1 micron as a dispersed solid phase;

(ii) a dispersing agent in an amount sufficient to disperse the mesotrione as well as any other solid technical materials present in the formulation;

wherein the solid phase is dispersed in said aqueous and/or emulsion phase.

16. (Original) The suspoemulsion formulation according to claim 15 wherein the mesotrione, or agriculturally acceptable salt thereof, has an average particle size of less than 800 nanometers.

17. (Original) The suspoemulsion formulation according to claim 15 wherein the mesotrione comprises a metal chelate of mesotrione.

18. (Original) The suspoemulsion formulation according to claim 17 wherein the metal chelate of mesotrione comprises at least one member selected from the group consisting of copper or zinc chelates of mesotrione.
19. (Original) The suspoemulsion formulation according to claim 15 wherein the liquid, water-insoluble active ingredient comprises at least one member selected from the group consisting of acetamide herbicides and safeners.
20. (Original) The suspoemulsion formulation according to claim 19 wherein the liquid, water-insoluble active ingredient comprises acetamide herbicides.
21. (Original) The suspoemulsion formulation according to claim 20 wherein the acetamide comprises mixtures of metolachlor (S) and (R) isomers wherein the ratio of (S)-2-chloro-*N*-(2-ethyl-6-methylphenyl)-*N*-(2-methoxy-1-methylethyl)acetamide to (R)-2-chloro-*N*-(2-ethyl-6-methylphenyl)-*N*-(2-methoxy-1-methylethyl)acetamide is in the range of from 50-100% to 50-0%.
22. (Original) The suspoemulsion formulation according to claim 15 further comprising at least one safener.
23. (Original) The suspoemulsion formulation according to claim 22 wherein the safener comprises at least one member selected from the group consisting of benoxacor and dichlormid.
24. (Original) The suspoemulsion formulation according to claim 15 further comprising at least one additional solid, water-insoluble active ingredient.
25. (Original) The suspoemulsion formulation according to claim 24 wherein the at least one additional solid, water-insoluble active ingredient comprises at least one member selected from the group consisting of triazine herbicides, isoxazole herbicides and sulfonylurea herbicides.
26. (Original) The suspoemulsion formulation according to claim 15 further comprising a water-soluble active ingredient dissolved in the aqueous phase.
27. (Original) The suspoemulsion formulation according to claim 26 wherein the water-soluble active ingredient comprises at least one member selected from the group consisting of glyphosate, glufosinate and agriculturally acceptable salts thereof.

28. (Original) A pesticidal composition obtained by diluting a suspoemulsion formulation according to claim 15 in water.
29. (Original) The pesticidal composition of claim 28 further comprising at least one member selected from the group consisting of co-herbicides, fungicides, insecticides, acaricides and nematocides.
30. (Withdrawn) A method for controlling undesired plant growth in crops of useful plants, said method comprising treating the useful plants, their seeds or seedlings or the crop area thereof with a pesticidal composition according to claim 28.
31. (Withdrawn) The method of claim 30 wherein the pesticidal composition is applied pre- or post-emergent.
32. (Withdrawn) The method of claim 30 wherein the crop of useful plants is maize.

IX. EVIDENCE APPENDIX

None

X. RELATED PROCEEDINGS APPENDIX

None

Respectfully submitted,

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Date: Tuesday, January 19, 2010